SUPREME COURT, U. S.
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NO. 73-1940

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1973

CHARLES DEWEY ALTSMAN
and
JOHN J. AGUIRRE,

Petitioners

V.

STATE OF TEXAS,

Respondent

On Petition for Part of Centivar
To The Court of Criminal Appeals of Texas

BRIEF IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, for which review is not yet reported. A copy of the opinion is also attached to the petition herein.

JURISDICTION

Respondent is not aware of the exact date of filing of the petition herein and so is unable to state with certainty whether the time requirements for the filing of a petition for writ of certiorari have been met. In any event, Respondent disputes Petitioner's contentions that rights guaranteed by the Constitution of the United States have been violated.

QUESTION PRESENTED

The central question presented by the petition is that the penal laws of Texas as they existed at the time of Petitioner's trial imposed overly harsh penalties for the private possession of marijuana. From this initial premise, arises Petitioner's assertion that marijuana was improperly classified as a narcotic drug at the time of Petitioner's trial, that the Eighth Amendment to the United States Constitution is offended by the imposition of impermissible penalties, that punishment for private possession in the home violates the First Amendment freedom of self expression, that the Texas narcotics law (as then written) was in conflict with the federal narcotics law and that the probation laws of Texas are deficient in not recognizing, in full measure, the good character of defendants in marijuana possession cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner contends that the First, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution are involved.

Also involved are Article 725b of the Texas Penal Code of 1925 and Article 42.12 of the Code of Criminal Procedure of 1966, the Adult Probation and Parole law of Texas.

STATEMENT OF THE CASE

Petitioners were charged with the possession of marijuana and pled guilty in a joint trial before the court. An application for probation was filed, but was denied and the court set punishment at three years confinement for each of the Petitioners. Appeal was taken to the Court of Criminal Appeals of Texas which affirmed the judgment of conviction on March 6, 1974. This petition for writ of certiorari followed.

ARGUMENT AND AUTHORITIES

1. *The Wisdom of the Texas Legislature In Classifying Marijuana as a "Narcotic Drug" and in Setting Penalties for Possession, Should Not Be Questioned By The Courts*

Perhaps the most firmly established principle in the constitutional law is the rule that the wisdom, necessity

and motivation of a legislature in enacting laws will not be subject to judicial scrutiny and review.

The rule (or rules) is stated in American Jurisprudence (16 Am. Jr., pages 374 through 384, the Article on Constitutional Law) as follows:

> "The wisdom of legislation is not a factor which is relevant to its constitutionality and thus is not a matter which the courts will consider when legislation is under constitutional attack . . .
>
> "It is a mandate often repeated in the decisions of the courts that the expediency of legislation is not a matter for judicial concern and that inexpediency does not warrant invalidation on constituional grounds. In judging the constitutionality of a particular statutory provision, it is not for the court to determine whether the provision comports well or ill with the purposes of the statute of which it is a part . . .
>
> "Propriety of legislation is not a factor going to its constitutional validity. And a statute or ordinance which is unnecessary is not for that reason unconstitutional; indeed, in determining the constitutional validity of legislation, the courts are unconcerned with issues as to the necessity for the enactment of the legislation in question . . .
>
> "One of the doctrines definitely established in the law is that if a statute appears on its face to be constitutional and valid, the court cannot inquire into the motives of the legislature."

Texas has "termed" marijuana a narcotic drug in Article 725b, Texas Penal Code. Proper notice is given to its citizens of the classification and that they will be

punished for possession and trafficking in marijuana and the wisdom of the legislature, in calling or classifying marijuana as a narcotic, cannot be questioned. Texas could properly include tobacco in the statute and no constitutional principle would be offended or contravened.

Moreover, the wisdom of the Texas Legislature in setting penalties for marijuana should not be replaced by judicial wisdom and feeling as to the proper penalty to be affixed.

In *McCray v. United States,* 195 U. S. 27 (1907), the act of Congress in placing a prohibitive tax on artificially colored margarine was considered by this Court. It was argued that Congress had arbitrarily discriminated against oleomargarine in favor of butter for the benefit of the butter industry. This Court stated at pages 53, 54 and 55:

> "Whilst, as a result of our written constitution, it is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution, and therefore in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, *no instance is afforded from the foundation of the government where an act, which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust.* To announce such a principle would amount to declaring that in our constitutional system the judiciary was not only

charged with the duty of upholding the Constitution but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overturn the entire distinction between legislative, judicial and executive departments of the governments, upon which our system is founded, and would be a mere act of judicial usurpation."

This Court repeated the rule in *Ferguson v. Skrupa,* 372 U. S. 726 (1963) as follows:

". . . the doctrine that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely has long been discarded. We have returned to the original constitutional propostion that courts do not substitute their social economic beliefs for the judgment of legislative bodies, who are elected to pass laws . . .

". . . we are not concerned with the wisdom, need or appropriateness of the legislature."

Finally, in dealing with the control of marijuana, this Court observed in *Leary v. United States,* 395 U. S. 6 (1969) (while holding that the marijuana statutes, under consideration, violated a defendants' right against self-incrimination) at page 54:

"We are constrained to add that nothing in what we hold today implies any constitutional disability in Congress to deal with the marijuana traffic by other means."

Clearly, the states as well as Congress have the power to control traffic in marijuana. Given the power, thelegislative wisdom of the Texas Legislature is terming marijuana a "narcotic drug" and in seeting penalties is not for the courts to re-examine under any form of Constitutional attack.

2. *The Penalties For Possession of Marijuana And The Consequences That Flow From This Possession Under The Texas Scheme Of Regulation Are Not Unduly Harsh And Do Not Constitute Cruel And Unusual Punishment As Forbidden By The Eighth Amendment Of The United States Constitution.*

The primary thrust of Petitioner's entire argument in this case is that marijuana is not a dangerous substance, that its use is not harmful to the physical well-being and mental stability of the user, and that accordingly, penalties for the possession of marijuana in one's homes violates the First Amendment guarantee of freedom of expression and the Eighth Amendment's prohibition against creul and unusual punishment.

Petitioner cites much authority for the proposition that marijuana is not a dangerous substance and asserts that there are no adverse effects to the user.

However, the authorities are not uniform in postulating the deleterious consequences of marijuana use, and the more recent studies have indicated that

marijuana can cause lasting physicological and psychological harm.

Perhaps the most recent discussion of the adverse effects of marijuana use was before the Sub-Committee on Internal Security, Committee on the Judiciary, of the United States Seante in May of this year. Various witnesses testified to the perhaps irrversible, harmful impact of the sbustance, both psychologically and physically, and many distinguished witnesses concluded that marijuana usuage constitutes a major public health problem. See especially the testimony of Dr. Gabriel Nahas, M. D., Ph.D., Dr. Martin A. Stenchever, Philip Zeidenberg, M. D., Ph.D., Andrew I. Malcholm, M. D., F. R. C. P. (C), Robert D. Heath, M. D., M. Sci., W. D. M. Paton, Professor of Pharmacology, University of Oxford, Dr. Robert C. Kolodny, Director, Infertility Program, Reproductive Biology Research Foundation, St. Louis, Missouri, and Henry Bril, M. D.

The testimony of the witnesses mentioned above and that of others, affirmatively demonstrated the very distinct and real possibility that the use of marijuana causes harmful mental and psychological changes in users and that resultant public health and social problems follow.

Society is entitled to protect itself from the consequences of marijuana use and the decision of the Texas Legislature to classify marijuana as a drug and to set penalties which may be in excess of those from other jurisdictions should not be judicially questioned.

Given the possible social problems caused by the use of marijuana and the right of the Texas Legislature to act toward alleviating this problem, the other contentions made by Petitioner in his brief disappear.

CONCLUSION

For the reasons advanced above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, certify that a copy of the foregoing Brief in Opposition was served on the attorneys for Petitioner, by depositing same in the United States Mail, postage prepaid, certified mail, addressed to Mr. Philip D. Hardberger, Attorney at Law, 119 Villita, San Antonio, Texas and Mr. Jack M. McGinnis, Attorney at Law, 7900 Callaghan Road, Suite 150, San Antonio, Texas on this the _____ day of August, 1974.